NOS. 20336,

20753.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANCISCO J. VEGA-HERNANDEZ,
FRANK RIVAS, JR.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellants to be guilty as charged in a one-count indictment following a jury trial.

The offense occurred in the Southern District of California. The District Court had jurisdication by virtue of Title 18, United States Code, Sections 2 and 3231, and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code,

Sections 1291 and 1294, although there is some question regarding jurisdiction in the case of appellant Vega-Hernandez.

II

STATEMENT OF THE CASE

The one-count indictment charged that appellant Francisco Javier Vega-Hernandez (hereinafter referred to as "Vega"), in San Diego County, knowingly concealed, and facilitated the transportation and concealment of, approximately two grams of heroin, a narcotic drug, which, as he then and there well knew, had been imported and brought into the United States contrary to law, and that appellant Frank Rivas, Jr., knowingly aided, abetted, counseled, induced, and procured the commission of that offense [C.T. 2].[1/]

Jury trial of appellants commenced on March 4, 1965, before United States District Judge Fred Kunzel [R.T. 3, 5].[2/] Appellants were found guilty as charged on March 5, 1965 [C.T. 3-4].

Thereafter, on April 5, 1965, appellant Vega was committed to the custody of the Attorney General for five years, and appellant Rivas was committed to the custody of the Attorney General for ten years with a recommendation that the sentence run concurrently to any state institutional sentence that might be imposed [C.T. 5-6].

1/ "C.T." refers to the Clerk's Transcript.

2/ "R.T." refers to the Reporter's Transcript.

Each appellant filed notice of appeal [C.T. 7-8].

III

ERROR SPECIFIED

Appellant Vega lists the following points upon appeal:

1. Alleged error in the admission of evidence regarding another offense.

2. Alleged insufficiency of the evidence.

Appellant Rivas lists only one point upon appeal, contending that he was denied a fair trial by the admission of the evidence regarding another offense.

IV

STATEMENT OF THE FACTS

On November 23, 1964, in the Phoenix-Glendale area of Arizona, Lorenzo Zuniga told Lee Russell that he had a fellow from San Diego from whom he was getting his stuff and that the man was there and had "quite a bit of stuff" with him. Zuniga suggested that Russell might want to buy some. The man described by Zuniga was appellant Rivas. The "stuff" was heroin [R.T. 34-39].

Zuniga was known to law enforcement officers as a heroin addict and "small time peddler." He took Russell to meet Rivas in order to obtain a sample. The meeting took place in Glendale on the same date. [R.T. 11-12, 37, 88].

The following conversation occurred:

Rivas: "How much stuff do you want to buy?"

Russell: "I don't know. How much do you have?"

Rivas: "Well, I don't have but a few spoons here with me."

Russell: "What do you mean 'a few spoons'?"

Rivas: "Well, I got about six or seven spoons left."

Russell: "How is the stuff?"

Rivas: "It is pretty good stuff. It is recent stuff."

Russell: "Uncut stuff down here in Phoenix?"

Rivas: "Yes. It is real good stuff."

Zuniga: "Yes, it is." (R.T. 41-42)

Rivas told Russell that if he wanted to buy a big amount, he, Rivas, would bring it. He said that the price of the heroin would be $600 per ounce if he brought it to Phoenix and $500 per ounce in San Diego, [R.T. 13, 44].

Rivas agreed to sell one of the spoons to Russell, who said that he had to go and get some more money. Rivas told Russell to get the money and come back and that he would have the heroin for Russell [R.T. 15].

Russell then left and met with Federal narcotics agents Richard J. Yelvington and Frank Sojac. He reported that Zuniga's man had offered to make a sale. Yelvington said, "Let's try about a hundred dollars' worth and see if his stuff is heroin." Russell received $100 and went back to Rivas, who refused to make a sale but said that he would sell to Zuniga. Russell then went to get Zuniga and returned to Rivas, who made a sale to Zuniga, who paid the money furnished by Russell [R.T. 15-16, 71, 88-89].

Rivas handed a package to Zuniga, who delivered the package to Russell. Agent Yelvington observed the transaction by peering through a hole in a storage building [R.T. 19-20, 72-74].

Chemist Edward M. Eastland testified concerning his expert qualifications and testified that the package in question contained heroin [R.T. 135-38]. There also was testimony regarding the "chain of possession" of the exhibit [R.T. 16-18, 20, 54-55, 75-78, 137-39, 142-43, 152].

Appellant Rivas called Russell on the telephone later on the same day. He asked Russell if he wanted to make a bigger purchase. Russell replied in the affirmative and offered to go to San Diego as the price would be $100 cheaper per ounce. They agreed to meet in San Diego on the following day [R.T. 20-21].

Appellant Vega did not object to testimony concerning the events occurring in Arizona [R.T. 12]. The evidence was not received as to Vega, and the heroin exhibit was offered in evidence only in the case of Rivas and not received in evidence in Vega's case [R.T. 159, 198].

Agent Yelvington and Russell left Phoenix for San Diego by automobile and arrived in San Diego at about 3:30 a.m. on November 24. They rented two rooms in the Bayview Travelodge. Rivas called Russell by telephone at about noon and asked him whether he had brought the money. Russell said that he brought $1450. Rivas said that he would come over as soon as he could [R.T. 22, 78-79].

Appellants Rivas and Vega arrived at the side of the Bayview Travelodge

at approximately 1:55 p.m. Both of them left the vehicle in which they had arrived. Rivas went up the stairs to Room 15 of the Travelodge. Vega remained in the area of the parking lot and stood there for approximately 10 minutes, looking toward the windows of Room 15 once in a while. Russell was in Room 15, and Agent Yelvington had also rented Room 16, which was the adjoining room [R.T. 109-10]. There was a hidden radio transmitter in Room 15, and a radio receiver for the same frequency was in Room 16. Agent Yelvington had searched Russell and Room 15 during the morning and had found no narcotics [R.T. 65, 80-81].

Rivas knocked on the door of Russell's room, entered, and engaged in some conversation. After he asked Russell whether he had the money, Russell showed the $1450, and Rivas went to the door and whistled to appellant Vega. Vega came up the stairs, entered, and handed some powder to Rivas. Rivas dumped it out on a table, and Russell said that it looked good. They discussed the fact that the powder was a sample and the question whether Russell should pay in advance for the remaining three ounces [R.T. 23-25].

Agent Yelvington was listening to the conversation in the next room, using the radio receiver. When Agent Yelvington heard Rivas offer to take $600 in advance and leave Vega as security for the delivery of the "stuff" (meaning a narcotic), he called Russell on the telephone, told him to say that it was the manager calling, and told him not to pay any money in advance [R.T. 25, 81, 83, 85].

Russell agreed to go with Rivas, who poured the powder into a cellophane package and handed it to Vega. The three of them went downstairs and

and entered a vehicle and left. Rivas was driving with Vega in front on the passenger side. Russell was in the rear, seated behind Rivas, the driver [R.T. 25-26, 158].

Before the vehicle had traveled one-half of a block, another vehicle driven by Federal Bureau of Narcotics Officer Joe Baca drove alongside. Two officers with Baca identified themselves to Rivas, Vega, and Russell and told them to pull over. Rivas accelerated his vehicle. Rivas said something to Vega, and Vega threw an object over his right shoulder and out of the window. Rivas then stopped the vehicle after a shot was fired at a rear tire [R.T. 26, 108, 112, 134].

A cellophane container with powder was found on the ground, about 10 feet from the right rear fender of the vehicle operated by Rivas. It was just to the right of the path taken by the vehicle [R.T. 112].

Chemist Eastland testified that the powder in the container included heroin with some similarity to the heroin in the Arizona exhibit. There was testimony concerning the "chain of possession" of the exhibit [R.T. 112-14, 119-23, 139-43].

Appellants did not testify [R.T. 162].

V

ARGUMENT

A. ADMISSION OF EVIDENCE REGARDING THE ARIZONA OFFENSE DID NOT CONSTITUTE ERROR.

Appellant Vega has no standing to complain of the admission of

evidence of the activities occurring in Arizona, since the evidence was not received against him and since he made no objection when the evidence was offered [R.T. 12].

An objection is waived by failure to make timely objection in the Trial Court.

Ramirez v. United States, 294 F.2d 277, 283 (9th Cir. 1961).

The Trial Court very specifically informed the jury that none of the events "or anything that occurred in Arizona, is to be considered as against the defendant Vega. He was not there. He had no connection with it, nor can you charge him with any knowledge of it merely because of his association with the defendant Rivas." [R.T. 198].

Counsel for appellant Vega considered the Arizona testimony to be so unimportant to his client that he told the jury that "I am not even going into that because it has nothing whatsoever to do with the defendant Vega." [R.T. 174].

In view of the failure to make timely objection, the strong language in the instruction to the jury, and the relative insignificance of the Arizona evidence in Vega's case, it is respectfully submitted that his defense was not prejudiced by the admission of this evidence which was not even received in his case [R.T. 159, 198].

In regard to appellant Rivas, the evidence of his sale of heroin in Arizona, on the date previous to the date of the alleged offense in San Diego County, was admissible against him to show intent and also to prove the

crime charged.

This Court has frequently upheld the admission of evidence of crimes similar to the crime charged.

Enriquez v. United States, 188 F.2d 313, 314-15 (9th Cir. 1951);

Wright v. United States, 192 F.2d 595, 596 (9th Cir. 1951);

Medrano v. United States, 285 F.2d 23, 24-25 (9th Cir. 1960), cert. denied, 366 U. S. 968 (1961);

Klepper v. United States, 331 F.2d 694, 698-99 (9th Cir. 1964);

Teasley v. United States, 292 F.2d 460, 465 (9th Cir. 1961).

The instant appeal is far more favorable to appellee than the cited cases, particularly in view of the fact that the previous offense occurred on the previous day, as compared to approximately three years in Enriquez , one year in Klepper, about 10 months in Medrano, and at least four days in Wright. In Teasley, the two crimes involved differing substances (marihuana and heroin).

Furthermore, the Arizona evidence was admissible because the transaction was directly related to the crime charged in the indictment and was necessary in order to provide a complete picture of the transaction charged in the indictment. The Arizona sale and the San Diego sale involved the same real purchaser and same vendor and were part of the same transaction, since the Arizona heroin was a sample [R.T. 37] for the San Diego sale. The close connection between the Arizona transaction and the San Diego transaction is highlighted in the brief of appellant Vega, who also claims that the evidence

was inadmissible: "The whole enterprise in San Diego was the outgrowth of Russell's coming to Agent Yelvington's office in Phoenix . . . ." (Vega Brief, p. 3). Consequently, it is respectfully submitted that the evidence would have been admissible against appellant Rivas, even in the absence of the Trial Court's instruction to the jury, strictly limiting the effect of the evidence [R.T. 198-99].

B. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION OF APPELLANT VEGA.

Appellant Vega contends that the evidence was insufficient to sustain his conviction. However, the appellate court views the evidence in the most favorable light to sustain the judgment below.

Stein v. United States, 337 F.2d 14, 16 (9th Cir. 1964);

Mosco v. United States, 301 F.2d 180, 181 (9th Cir. 1962).

Aiding and abetting may be proved by circumstantial evidence.

Diaz-Rosendo v. United States, 357 F.2d 124, 129 (9th Cir. 1966).

Considering the rule that an appellate court views all inferences to be drawn from the evidence in the light most favorable to the government, [3/] it is evident that the powder possessed by Vega and Rivas at the Travelodge was heroin and was inside of the object thrown out of the window of the vehicle by Vega [R.T. 24-26, 112-13, 126, 141].

3/ Yeargain v. United States, 314 F.2d 881, 882 (9th Cir. 1963).

Russell testified concerning these events [R.T. 24-26], and his testimony was corroborated by the testimony of Agent Yelvington, who heard major portions of a conversation involving Russell and two other men, one of whom entered the room and was introduced after a whistle [R.T. 82-83]. Additional corroboration was provided by the testimony of Agent Baca, who watched as Rivas went to Room 15 and as Rivas, Vega, and Russell later left Room 15 together. Agent Baca testified that no one else had entered the room during the relevant period, so it is clear that Vega was one of the three men participating in the conversation overheard by Agent Yelvington [R.T. 110-11].

The heroin was found about 10 feet from the vehicle, after approximately 5 minutes of search [R.T. 126]. Although appellant Vega suggests that there is insufficient evidence to connect the heroin found upon the ground with the powder mentioned in Russell's testimony, the connecting evidence compares favorably to the evidence which was considered to be sufficient in the cases of Galvan v. United States, 318 F.2d 711 (9th Cir. 1963); Vaccaro v. United States, 296 F.2d 500 (5th Cir. 1961); and Ketchum v. United States, 259 F.2d 434 (5th Cir. 1958), cert. denied, 359 U.S. 917 (1959).

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PHILLIP W. JOHNSON